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In the Supreme Court of the United States

SALIM AHMED HAMDAN, *Petitioner*
v.
GEORGE W. BUSH, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE*

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers.

NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and appeared in this Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004).

NIMJ is actively involved in public education through its website, www.nimj.org, and through publications including the ANNOTATED GUIDE TO PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (2002) and two volumes of MILITARY COMMISSION INSTRUCTIONS SOURCEBOOKS (2003-04). NIMJ has also sought to improve public understanding of the military commissions by seeking release of comments on the rules governing military commissions. *National Institute of Military Justice v. Dep't of Defense*, Civil No. 04-312 (D.D.C.) (pending).

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* Counsel for all parties have consented to the filing of this brief. Copies of their letters have been filed with the Clerk. Counsel for NIMJ have authored this brief in whole, and no person or entity other than the *amicus*, its members or its counsel has made a monetary contribution to the preparation or submission of this brief.

Although many of NIMJ's directors and advisors have written and spoken publicly in their individual capacities concerning the military commissions, NIMJ itself has not taken a position with respect to the commissions' legality or desirability. NIMJ has, however, opposed calls for a boycott of the commissions by the civilian defense bar, *see* NIMJ, Statement on Civilian Participation as Defense Counsel in Military Commissions, July 11, 2003, in MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 2d 198 (2004), and has recommended several procedural improvements, including the use of notice-and-comment rulemaking, public availability of rulemaking comments, creation of an electronic case filing system, and establishment of a Clerk's Office.

SUMMARY OF ARGUMENT

The military commissions brought into being by the President on November 13, 2001 raise substantial issues that merit not only plenary review, but review at this time.

ARGUMENT

I

The issues presented in the petition are important and likely to recur

One of the most fundamental issues facing any democratic country is delimiting the boundary that separates the civil and military spheres. The proper delimitation of that boundary is a task that has repeatedly fallen to this Court. The use of military commissions in the context of the contemporary struggle against terrorism, in the absence of a declared war and where the adversary is often not affiliated with any nation, may be different in particular respects from its use in or after the Civil War, *e.g.*, *Ex parte Milligan*, 71 U.S. 763 (1866), or World War II, *e.g.*, *Ex parte Quirin*, 317 U.S. 1 (1942), but the issues remain vital ones. This is so even though, under the President's Military Order of November 13, 2001, the current generation of military

commissions is not authorized to try United States citizens. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57,833 (2001) (§ 2(a)). Non-citizens are of course subject to trial in the district courts and, in some circumstances (for offenses against the law of war), in general courts-martial. 10 U.S.C. § 818 (Uniform Code of Military Justice ("UCMJ") art. 18).

Nor is Mr. Hamdan's case confined to questions of demarcation, as critical as those are. For example, much has been written about whether the Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1949), is judicially enforceable. This Court would materially assist the parties by determining whether Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), which has the force of law, "executes" that Convention. Similarly, plenary review would permit a fuller exploration of the history of military commissions and their procedures, about which the scholarly literature is richer and more abundant than it was at the time of *Quirin*.

The Executive Branch has concluded—and there is no reason to question it—that the current period of terroristic violence may last many years. Some of those detained at Guantánamo Bay face the prospect, rightly or wrongly, of remaining there for the rest of their lives. The present strife is highly unlikely to have a fixed end date, and the extensive preparations the Executive Branch has made for the conduct of military commissions make it likely that the four prosecutions instituted thus far will not be the only ones conducted under the President's Military Order. The President has entered additional "reason to believe" determinations under § 2(a) of that Order, thereby rendering eight other individuals who are already in detention subject to trial by military commission. Press Release, Dep't of Defense, Military Commissions to Resume (July 18, 2005); *see also* Press Release, Dep't of Defense, Presidential

Military Order Applied to Nine More Combatants (July 7, 2004).

Given the continuing epidemic of violent attacks around the world, it would be foolhardy to treat the current class of potential military commission prosecutions as finite. More attempts on our Nation, its armed forces, its citizens, and its property and facilities both here and abroad cannot be dismissed as improbable or speculative. Assuming, as experience teaches, we remain capable of and committed to apprehending those who would array themselves against us, the likelihood of further prosecutions by military commissions in this new and potentially even uglier era seems substantial. Demarcation of the juridical boundaries for those proceedings in a way that reconciles 21st-century demands with our Constitution and legal traditions is a core function of this Court.

II

There are compelling reasons for the Court to address the issues presented at this time

That the proceedings of the military commission that will try Mr. Hamdan will at some point be subject to review on habeas corpus seems beyond doubt. We believe, however, that reviewing the issues presented in his petition prior to trial would serve the national interest and be a wise use of this Court's resources.

First, the military commissions, Review Panel, Appointing Authority, counsel for both sides, and those who stand accused or have been designated as potential accuseds all need guidance on what is legally permissible in these proceedings. Many years have passed since the last military commissions were conducted, and the rules governing the current generation of commissions differ in important respects from settled civilian and military justice practice. Requiring retrials in the event of prejudicial error would

entail a disastrous waste of resources and further retard what is supposed to be a speedy process.

Second, Mr. Hamdan and the others who stand accused before military commissions (or are in line to do so) have already been in detention for years. Those years have not been years of idleness for this or the lower federal courts, but the fact remains that the legal process has moved very slowly. Nor is there any end in sight: even those acquitted by a military commission may remain in indefinite detention as enemy combatants. Katherine Q. Seelye, *Pentagon Says Acquittals May Not Free Detainees*, N.Y. Times, Mar. 22, 2002, at A13; Ronald W. Meister, Discussion of Military Comm'n Inst. No. 7, in MILITARY COMM'N INSTRUCTIONS SOURCEBOOK 151, 152 (2003). What is more, the Review Panel has 75 days in which to act, Military Comm'n Order No. 1 (rev. Aug. 31, 2005); Dep't of Defense Fact Sheet, Changes to Military Commission Procedures, Aug. 31, 2005, at 2, its decisions to affirm are not final, and considering the protracted delays that have long plagued Executive Branch decision-making on death sentences under the UCMJ, by no means mark the end of the process. From this perspective, common decency suggests that prudential considerations about waiting for the legal process to run its course before considering the systemic issues Mr. Hamdan seeks to raise should not control.

Third, while the Court customarily does not entertain petitions prior to final judgment, there are times when doing so has much to commend it. *Quirin* itself is an example. Another is *Solorio v. United States*, 483 U.S. 435 (1987), where the Court granted review of a court-martial that had not yet been completed. The case presented a recurring issue of court-martial jurisdiction over non-service-connected cases. *See also, e.g., Bates v. United States*, 522 U.S. 23 (1997); *Oliver v. United States*, 466 U.S. 170 (1984). Similarly, granting Mr. Hamdan's petition would afford the Court an opportunity to clarify areas that have already proven to be potent sources of confusion and uncertainty. This is

hardly surprising given how much has changed in the pertinent legal landscape—such as enactment of the UCMJ and the War Crimes Act, 18 U.S.C. § 2441, ratification of the 1949 Geneva Conventions, and the evolving constitutional ground rules of criminal procedure—since military commissions were last employed so long ago. Additionally, as the petition points out (at 30), litigation arising out of Mr. Hamdan's case and other military commission prosecutions will—because Guantánamo Bay is not in any judicial circuit—be concentrated in the District of Columbia Circuit. Hence, the usual arguments for allowing an issue to percolate through the lower courts or waiting for a split in the circuits to emerge do not obtain.

The American people have followed this and other Guantánamo-related cases with understandable interest. Observers in countries that share our legal tradition and wish us well as a nation (and in others that do not) have watched with increasing consternation as the military commission process has unfolded. An expression of this Court's views on the important legal issues presented will therefore not only confer a practical benefit on those who are directly involved in the cases, but will go far to foster public confidence both here and abroad in the administration of justice in the new environment that has been thrust upon us. However many allies were in the coalition that went to war in Iraq, there is no limit to the number we need in the struggle for the rule of law.

When the United States puts citizens of nations around the globe on trial in tribunals that are barred from trying our own citizens, it is only natural that those nations and *their* citizens will take a lively interest in the proceedings. This Court's role in protecting the fundamental rights of Americans is both well known and admired around the world. The question people elsewhere will inevitably ask is whether the Supreme Court of the United States has the time and interest to address the treatment of non-Americans. Given world events, that question trumps the factors that might otherwise govern whether to grant review now. A

decision to grant review, whatever the ultimate outcome, will in itself send a clear message that the highest court of this land is committed to examining claims of denial of fundamental rights from citizens of other countries even as our own country fights what the government regards as a new kind of war and attempts to frame the procedures it considers necessary to fight that war.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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